Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GILLIAN MARY SIEMON-NETTO, UWE SIEMON-NETTO, and H. CHRISTOPHER STARKEY,

Petitioners,

—v.—

MARK ROSE, ELICE J. ROSE and PHILIP M. STAMM,

Respondents,

CITIBANK, N.A.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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153 pp

QUESTION PRESENTED

Does Due Process require, at a minimum, that a Notice of Pendency of Class Action inform potential class members that the class action may affect their legal rights vis-a-vis a non-party, specifically, deprive them of counterclaims and defenses against claims the third party will make, and provide the potential class members with an informed opportunity to decline participation in, or opt out of, the class?

PARTIES TO THE PROCEEDING

Objector-Appellants below, and petitioners in this Court, are Gillian Mary Siemon-Netto, Uwe Siemon-Netto, and H. Christopher Starkey. In addition, the following individuals were Objector-Appellants below: Heather Adams, George Aldrich, Joseph Barth, Derek J. Bartlett, Victor Beauzay, Judith L. Boudreau, Janet Budge, Kenneth T. Burgess, A.J. Burns, S.M. Butler, G.G. Campbell, John A. Carter, Julie M. Carter, R.H. Carter, Thomas H. Collins, Graham Thomas John Cook, Julie Corman, Jonathan Crisp, Alfred Doll-Steinberg, Adele Gerde Doll-Steinberg, Robert Edward Dockerty, Bernard John Edmonds, B.C. Ellis, Clive Francis, Simon Garrow, Geoffrey E. Hall, John M. Hamilton, Howard Harper, Monika Harper, Richard G.D. Harrisson, Antonio Francis Healey, N.R.K. Hicks, Yumiko Honda, Richard Hulse, Sir William Jaffray, Kevin James, J.H. Johnson, Peter B. Johnson, R. William Johnston, Menel S. Kaliff, Donal Kinsella, R. Krebs, Sir Michael Leighton, Mark I. Levy, Elizabeth Levy, Frank Lin, Edwin R. Loder, Barbara Lyons, J.J. Macbrien, David Mainwaring, Robert H. Morgan, Max Mosley, John Neiger, Frederick Thomas Poole, Robert Posner, Frederick Enoch Price, Margaret Ann Price, Ross C. Radford, Charles Ranald, Regis Remillard, Gavin Sorrel, Robert L. Swisher, Linda K. Treitel, John Troostwyk, Irene Buchman Weinberg, Louis S. Weinberg, D.J. Weller, C. Alonzo Williams, M. Wilson, Myra Wilson, Peter Wilson, M. Worster, P. Worster, Anna Young.

Plaintiffs-Appellees below, and respondents in this Court, are Mark Rose, Elice J. Rose and Philip M. Stamm.

Defendant-Appellee below, and respondent in this Court, is Citibank, N.A. ("Citibank").

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PETITION FOR A WRIT OF CERTIORARI

Gillian Mary Siemon-Netto, Uwe Siemon-Netto, and H. Christopher Starkey ("Petitioners"), by their undersigned counsel, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINION BELOW

The Summary Order of the Court of Appeals was not published but is available on Westlaw at 2003 WL 21982207 (2nd Cir. (N.Y.)). The Court of Appeals' Summary Order is reprinted in the Appendix at 1a. The Opinion of the District Court was not published but is available on Westlaw at 2002 WL 31663577 (S.D.N.Y.). The Opinion of the District Court is reprinted in the Appendix at 6a.

JURISDICTION

The Court of Appeals entered its judgment on August 20, 2003. Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provision at issue is the Due Process Clause of the Fifth Amendment: "No person shall be . . . deprived of life, liberty, or property, without due process . . . ."

The statute at issue is Rule 23(c)(2) of the Federal Rules of Civil Procedure: "In any class action maintained under subdivision (b)(3), the court shall direct to

the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel."

STATEMENT OF THE CASE

Facts

Renowned internationally in the insurance world, the Society of Lloyd's (commonly known as Lloyd's of London, "Lloyd's") is not an insurer but rather a collection of individuals[1] who underwrite insurance through groups called syndicates. These individual underwriting members of Lloyd's are usually called "Names." Each syndicate lasted one year, and a Name's participation in a new syndicate for a new year was supposed to occur only after obligatory full disclosure about the financial condition of Lloyd's and the syndicate for the old year. Names typically underwrote insurance in more than one syndicate per year and participated in specific syndicates for more than one year. If a syndicate suffered losses, a Name participating in that syndicate had to pay his *pro rata* share of the losses to the extent of his or her net worth.

Pursuant to the United Kingdom Insurance Companies Act of 1982 and earlier statutes, Lloyd's deposited all

[1] Beginning in 1994, corporations were also allowed to become underwriting members of Lloyd's. No such Names were involved in this matter below.

premiums paid in United States currency and handled all claims to be paid in United States currency in the Lloyd's American Trust Funds ("LATF"), organized under the Lloyd's American Trust Deed. Citibank and its predecessors served as trustee for the LATF from its creation in 1939. The money in the LATF was to be kept in separate fiduciary accounts for each Name, year, syndicate, and policy.

Beginning in the 1970's and continuing to the early 1990's, syndicates that had underwritten insurance covering asbestos and environmental claims suffered enormous losses. Soon, the Citibank trust accounts holding funds for these syndicates became insolvent. Citibank and Lloyd's never told the Names about the condition of these trust accounts. Instead, they concealed their status by using funds from solvent syndicates to pay the losses suffered in the insolvent accounts. Receiving no notice of the mounting losses, new Names joined; and old Names renewed. The vast majority of the 10,000 new Names after 1982 were American citizens.

In 1995, the New York State Department of Insurance examined Lloyd's American business in the LATF and determined that Lloyd's had underfunded its reserves by many billions of dollars. In late 1996, Lloyd's underwent a corporate reorganization and recapitalization, commonly called the Reconstruction and Renewal plan ("R&R plan"), to overcome the under funding.[2] Under

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[2] A Name who participated in the R&R plan exchanged, in part or in full, his obligation to pay syndicate deficiencies for a new obligation to pay R&R debt; but he would be relieved of the syndicate deficiencies only as long as Equitas remained solvent. In fact, as a result of the continued asbestos tidal wave, current reports show that Equitas is already almost insolvent. Moreover, the European Parliament, following complaints by Names, is considering whether Lloyd's was properly regulated and, if not, whether the Names are entitled to compensation for losses they incurred by investing in the Lloyd's market.

the R&R plan the Names would pay a premium for reinsurance for their pre-1993 syndicate liabilities. To implement the R&R plan Lloyd's formed Equitas Reinsurance Ltd. ("Equitas"), a re-insurance company to be funded primarily by the premiums to be paid by the Names. The reinsurance premiums were called R&R debt. Although most of the Names agreed to participate in the R&R plan, paid their Equitas Premiums, and released their claims against Lloyd's and Citibank, approximately seventeen hundred American Names refused to participate.

Using its by-laws, including one it specifically adopted for the R&R plan, Lloyd's appointed a substitute agent, to engage in the charade of accepting the R&R debt on behalf of the non-accepting names. The substitute agent, a company "indirectly owned and controlled by Lloyd's," entered into the Equitas re-insurance contract on behalf of all non-accepting Names, in spite of the fact that they had rejected Lloyd's R&R settlement proposal. Despite their refusals, these Names became liable for the R&R debt as well as their syndicate deficiencies.

Lloyd's filed suits in England against the Names who refused to accept the R&R settlement for their supposed R&R debt and for the syndicate deficiencies.[3] By now, Lloyd's has likely obtained judgments in England against

[3] Although the Names involved in litigation with Lloyd's in the United Kingdom did not typically fair well, some courts in England nonetheless acknowledged that Lloyd's made misrepresentations and that the Names were not to blame for their losses. *See Jaffray v. Society of Lloyd's*, 2002 WL 1654876, at ¶¶ 321, 374-376 (C.A. July 26, 2002) (the appellate court found that Lloyd's represented "that there was in existence a rigorous system of auditing which involved the making of a reasonable estimate of outstanding liabilities including unknown and unnoted losses" and that, in fact, the system did not make any such reasonable estimates); *The Society of Lloyd's v. Laws*, 2003 WL 1822990, at ¶ 207(iv) (Q.B. (Comm Ct) April 17, 2003) ("The innocence of the Names in respect of any wrongdoing is not in doubt in relation to the causation of their losses.").

all, or almost all, non-accepting Names. Against those Names who are United States citizens or residents, the vast majority, Lloyd's obtained the judgments despite the fact that many, if not all, of those Names did not participate in the English cases.

Lloyd's has since begun numerous suits here in the United States seeking to enforce the English judgments. The Petitioners are presently defendants in actions brought by Lloyd's, and several others are pending. (*See, e.g., The Society of Lloyd's v. Gillian Mary Siemon-Netto and Uwe Siemon-Netto*, No. 03-1524 (D.D.C. filed July 15, 2003), *The Society of Lloyd's v. Daniel Francis Coughlin, John Herbert Sullivan, John Monroe Hamilton and Yumiko Honda*, No. 03-10949 (D.Mass. filed May 20, 2003), *The Society of Lloyd's v. Minna Jane Edelman, Kenneth Gross, Todd Gross, Wallace Colby Henderson, Judith P. Kenny, Barbara Lyons and Mark Stephen Rose*, No. 03-4921 (S.D.N.Y. filed July 1, 2003), *The Society of Lloyd's v. Meredith Ann Edelman, Bruce Russel Farkas, David Albert Lang and Kathleen McNally Sloane*, No. 03-4922 (S.D.N.Y. filed July 1, 2003).) The Names in the United States have typically raised various affirmative defenses and counterclaims. (*See* Amended Answer in *Lloyd's v. Siemon-Netto*, No. 03-01524 (D.D.C. filed July 15, 2003), a copy of which is reprinted in the Appendix at 100a.) Even though the litigation involved in this petition was against Citibank, the Names will lose their affirmative defenses and counterclaims against Lloyd's if the Court does not grant this petition and allows the decision below to stand.

Proceedings Below

The District Court: This case began when, between December 1995 and February 9, 1996, three Names filed separate actions against Citibank in a New York State court. The Court consolidated those cases and others. In

February 1996, Citibank removed the consolidated action to the United States District Court for the Southern District of New York. The complaints had three claims: accounting, breach of contract, and breach of fiduciary duty.

Citibank moved to dismiss. The district court dismissed plaintiffs' claims for an accounting and for breach of contract but sustained the claim for breach of fiduciary duty. Citibank also moved to dismiss on the ground that plaintiffs failed to join an indispensable party (Lloyd's). The district court denied that motion as well, saying that any interest Lloyd's might have in this action could be protected if Citibank impleaded Lloyd's or if Lloyd's intervened in the action. Citibank never impleaded Lloyd's, and Lloyd's never intervened.

Plaintiffs filed a consolidated amended complaint for breach of fiduciary duty against Citibank. They named no other person or entity as a defendant. Two and a half months later plaintiffs moved for certification of the class. The district court certified the class. In May, 1998, the Court approved the Notice of Pendency of Class Action ("Notice"); and it was sent to the class members. (See Appendix at 90a.) When it described the case, the Notice stated that plaintiffs sued Citibank for breach of its fiduciary duties and that plaintiffs sought damages from Citibank. (Appendix at 91a-92a.) Absolutely no language in the Notice stated or suggested that a class member's "legal rights" against Lloyd's would be affected by this litigation. To the contrary, in a section entitled "What happens if I remain a member of the class," the Notice stated that a class member's "legal rights with respect to the claims asserted against Citibank will be determined in this action." (Appendix at 96a.) The Notice neither stated nor suggested that the class could have or should have sued Lloyd's, and the

District Court's denial of the Citibank motion to dismiss because Lloyd's was an unjoined, indispensable party entitled the Names to conclude, if it did not determine, that the case involved no rights vis-a-vis Lloyd's. In fact, the Notice never mentioned Lloyd's except for a few historical references and did not suggest that the class in this case would seek to hold Lloyd's liable for its conduct, to obtain damages from Lloyd's, or to put the class members' rights against Lloyd's at issue in any way. Requests to withdraw or opt out had to be postmarked on or before October 1, 1998.

Plaintiffs served one set of document requests on Citibank but took no depositions. The district court held six settlement conferences. Shortly before the final settlement conference and almost five years after commencement of the action, plaintiffs deposed a settlement confirmation witness, a Citibank employee; and in May, 2002, almost four years after the opt-out deadline, the parties signed a Stipulation and Agreement of Settlement ("Settlement"). The district court gave it preliminary approval later that month.

In the Settlement, the class exchanged its potentially multibillion dollar claims for—after counsel fees and expenses—four million fifty thousand dollars ($4,050,000) in cash and ten million two hundred thousand dollars ($10,200,000) in credit notes. The credit notes, however, could only be used to pay R&R debt; but every class member had rejected the R&R settlement, thereby denying he or she owed R&R debt to Lloyd's. In addition, the credit notes are virtually worthless because the amount of R&R debt allegedly owed by the class is enormous, substantially more than twenty times the "value" of the credit notes.

More important to Petitioners, the Settlement not only gave a release to Citibank, it also gave a release to

Lloyd's. According to the Settlement, Lloyd's would be released from "all claims, rights, or causes of action or liabilities of any kind whatsoever . . . in relation to the establishment, conduct, administration, operation, supervision, direction or oversight of the LATF." In fact, notwithstanding the assertions of plaintiffs and Citibank below that the release to Lloyd's is very limited, Lloyd's obtains the same broad release as Citibank.

The district court held a hearing on the proposed settlement and, over the due process (defective notice) and other objections of Petitioners and many other objecting class members, approved it in November 2002. (See Appendix at 6a.) The court entered a Final Judgment, and the Petitioners and other Objectors appealed.

The Court of Appeals: Petitioners, and other Objectors below, appealed to the United States Court of Appeals for the Second Circuit raising three issues including their Due Process claim.[4] On August 20, 2003, the Second Circuit, in a Summary Order by Judge Jacobs and Judge Sotomayor[5], affirmed the District Court's decision approving the settlement in this case. (See Appendix at 1a.) The Second Circuit did not issue an

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[4] Petitioners also argued below that the settlement fails to compensate the class adequately and fairly in light of the potential damages in this case against Citibank and the dollar benefit to Lloyd's under the releases. Moreover, when the district court evaluated the settlement, it balanced the settlement compensation and the claims and rights against Citibank; but it approved disposition of all rights against both Citibank and Lloyd's. Hence, the fairness evaluation did not consider the factors it should have. In addition, Petitioners claimed that plaintiffs' counsel conducted insufficient discovery (a single request for documents from Citibank and one settlement confirmation deposition) to balance the value of the claims and the terms of the settlement.

[5] Between the date of oral argument and the date of the Second Circuit's Summary Order, the Honorable Fred I. Parker died.

opinion of its own but adopted the reasoning of the District Court.

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS BELOW RAISE AN IMPORTANT QUESTION CONCERNING THE DUE PROCESS REQUIREMENTS FOR THE CONTENT OF A NOTICE OF PENDENCY OF CLASS ACTION, A QUESTION THIS COURT HAS NOT ADDRESSED BUT SHOULD RESOLVE

The issue presented by this petition, the test for the content of Rule 23 notice to the class, has never been addressed by this Court. But it arises in every one of the hundreds of federal and state class actions filed every year.

By approving the settlement in this case, the District Court, and the Court of Appeals by adoption, have, in effect, held that Due Process does not require a notice of pendency of class action to inform class members that their rights against a non-party may be determined by a later settlement of the pending case. The District Court found it sufficient for the Notice to tell the class members about Lloyd's historical relationship "to the events at issue in this action." (Appendix at 28a.) The District Court also found that it was enough that "the Class Members were put on notice that their legal rights and obligations relating to the LATF [generally] might be affected." (Appendix at 30a.)[6]

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[6] The District Court attempted to buttress its decision by citing to cases in which courts approved settlements including a release to a non-party. These cases do not apply where the class members have independent claims and defenses against the non-party beneficiary of the settlement.

When important "rights" of counterclaim and "rights" of defense against a non-party are at issue, Due Process requires more. Although we consider the settlement a very poor effort on behalf of the class, we do not seek review of it. As we did in both courts below, we seek review of the disposition, without an opportunity to "opt-out" on notice, of the "rights" vis-a-vis Lloyd's, a non-party.

Notice to the class is not satisfied by some pro forma, superficial discussion of the case. It is the "cornerstone" of Rule 23's constitutional requirements.[7] *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (noting, generally, that at a minimum due process requires notice); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974) (rejecting the argument that adequate representation, not notice, is the touchstone of due process in a class action); *Hansberry v. Lee*, 311 U.S. 32 (1940); *In re Four Seasons Sec. Laws Litig.*, 502 F.2d 834, 842 (10th Cir. 1974) ("The touchstones of due process in class actions have always been notice and adequacy of representation . . . ."). Although this Court has considered other aspects of the notice provision of Rule 23 in a few earlier decisions, it has never dealt with the content of the notice or fixed a test for notice. At

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[7] Proposed amendments to Rule 23, approved by this Court, will become effective in two weeks barring Congressional legislation to the contrary. The proposed amendments would give a district court discretion to "refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so." Although this amendment might give a district court the ability to cure the problem created in this case by the inadequate Notice and overreaching Settlement, it would not fill the void, applicable to all class actions, caused by the lack of a Supreme Court test for the content of notice. Of course, the proposed amendments to Rule 23 do not, and cannot, limit the requirements and protections of the Due Process Clause; and they do not apply here.

most, the Court has emphasized its importance. The Notice should tell a reasonable person enough about the case to evaluate the risks and benefits. But the Notice here, along with the history of the case, the lower court's decision on the motion to dismiss, and the conduct of Lloyd's, made clear to all that Lloyd's would never be involved in the case.

In *Erhardt v. Prudential Group, Inc.*, 629 F.2d 843, 846 (2d Cir. 1980), the Second Circuit explained:

> "Notice to class members is crucial to the entire scheme of Rule 23(b)(3). It sets forth an impartial recital of the subject matter of the suit, informs members that their rights are in litigation, and alerts them to take appropriate steps to make certain their individual interests are protected. It also preserves the right of class members to 'opt out' if they believe their interests are antagonistic to the other class members, or if they wish to proceed by separate suit."

In *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088 (5th Cir. 1977), the Fifth Circuit found a class action notice deficient because it failed to include information about a partial settlement intended to help fund the litigation. Discussing the requirements of due process, the Fifth Circuit stated that the notice:

> must . . . contain an adequate description of the proceedings written in objective, neutral terms, that, insofar as possible, may be understood by the average absentee class member. (Citations omitted.)
>
> * * *
>
> Absentee class members will generally have had no knowledge of the suit until they receive the initial class notice. This will be their primary, if not

> exclusive, source of information for deciding how to exercise their rights under rule 23.
>
> * * *
>
> *Not only must the substantive claims be adequately described but the notice must also contain information reasonably necessary to make a decision to remain a class member and be bound by the final judgment or opt out of the action.* The standard then is that the notice required by subdivision (c)(2) must contain information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out or remain a member of the class and be bound by the final judgment.

Id. at 1104-05. [emphasis supplied]

The Notice identifies one defendant, *Citibank*; describes plaintiffs' claim that *Citibank* breached its fiduciary duties; states that plaintiffs seek to recover their damages from *Citibank*, including, among other things, fees paid to *Citibank* and "damages for monies they invested in Lloyd's syndicates which they would not have invested had *Citibank* apprised them of the true condition of the risks they faced . . . ."; and states that a class member's "legal rights with respect to the claims asserted against *Citibank* will be determined in this action . . . ." (Appendix at 91a-93a) (emphasis supplied).

The Notice in this case failed to identify the subject matter of the lawsuit; failed to identify the participants in the settlement, and failed to describe the rights and liabilities that would be resolved four years after the time to opt out expired. The Notice does not identify Lloyd's as a party to or part of this lawsuit. In discussing the case, the Notice does not mention that the class members would attempt to hold Lloyd's liable for its

conduct, or to obtain damages from Lloyd's in counterclaims, or assert claims against Lloyd's. Most important, nothing in the Notice indicates explicitly or implicitly that the litigation will affect the class members "legal rights" (claims and affirmative defenses) against Lloyd's. A reasonable person, trying to make an informed, intelligent decision to withdraw from, or remain in, the class and be bound by the final judgment would certainly consider determination of his rights against Lloyd's material.

The Petitioners, and the rest of the class, had to withdraw at a date (October 1, 1998) when nothing suggested that their rights against Lloyd's would be affected by this case. Not until almost four years after they had to withdraw did they learn they were expected to release "rights" (claims, counterclaims, and defenses) against Lloyd's. The Notice in this case violated Due Process, which requires an informed opportunity to decline participation in the class, and a proper test for notice would have required this information before the lower courts could approve the settlement in this case.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this petition for a writ of certiorari be granted.

Respectfully submitted,

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